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DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2016–OS–0113]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.) and Notice of Public Meeting.

SUMMARY: The Department of Defense requests comments on proposed changes to the Manual for Courts-Martial, United States (2012 ed.) (MCM). The proposed changes concern the rules of procedure and evidence applicable in trials by courts-martial. The approval authority for these changes is the President. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.01, “Preparing, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony,” June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

The proposed changes also concern supplementary materials that accompany the rules of procedure and evidence and punitive articles. The Department of Defense, in conjunction with the Department of Homeland Security, publishes these supplementary materials to accompany the Manual for Courts-Martial. Supplementary materials consist of Discussions (accompanying the Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, and the Punitive Articles), Analyses, and various appendices. The approval authority for changes to the

supplementary materials is the General Counsel, Department of Defense; changes to these items do not require Presidential approval.

DATES: Comments on the proposed changes must be received no later than [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. A public meeting for comments will be held on December 15, 2016, at 10 a.m. in the United States Court of Appeals for the Armed Forces building, 450 E Street, NW, Washington DC 20442-0001.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Department of Defense, Office of the Deputy Chief Management Officer, Directorate for Oversight and Compliance, 4800 Mark Center Drive, Mailbox #24, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Major Harlye S.M. Carlton, USMC, Executive Secretary, JSC, (703) 693-9299, harlye.carlton@usmc.mil. The JSC website is located at <http://jsc.defense.gov>.

SUPPLEMENTARY INFORMATION: This notice is provided in accordance with DoD Directive 5500.17, “Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,” May 3, 2003.

The JSC invites members of the public to comment on the proposed changes; such comments should address specific recommended changes and provide supporting rationale.

This notice also sets forth the date, time, and location for a public meeting of the JSC to discuss the proposed changes.

This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

The proposed amendments to the MCM are as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 104(b)(1)(B) is amended to read as follows:

“(B) Give a less favorable rating or evaluation of any defense counsel or special victims’ counsel because of the zeal with which such counsel represented any client. As used in this rule, “special victims’ counsel” are judge advocates, and civilian counsel, who, in accordance with 10 U.S.C. 1044e, are designated as Special Victims’ Counsel.”

(b) R.C.M. 601(d)(2)(B) is amended to read as follows:

“The convening authority has received the advice of the staff judge advocate required under Article 34.”

(c) R.C.M. 701(g)(2) is amended to read as follows:

“(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such

other order as is appropriate. If any rule requires, or upon motion by a party, the military judge may review any materials *in camera*, and permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge *in camera*. If the military judge reviews any materials *in camera*, the entirety of any materials not ordered disclosed by the military judge shall be sealed and attached to the record of trial as an appellate exhibit. Such material may only be examined by reviewing or appellate authorities in accordance with R.C.M. 1103A.”

(d) R.C.M. 704(c) is amended to read as follows:

“(c) *Authority to grant immunity.* A general court-martial convening authority, or designee, may grant immunity, and may do so only in accordance with this rule.”

(e) R.C.M. 704(c)(1) is amended to read as follows:

“(1) *Persons subject to the code.* A general court-martial convening authority, or designee, may grant immunity to a person subject to the code. However, a general court-martial convening authority, or designee, may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under chapter 601 of title 18 of the U.S. Code.”

(f) R.C.M. 704(c)(2) is amended to read as follows:

“(2) *Persons not subject to the code.* A general court-martial convening authority, or designee, may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under chapter 601 of title 18 of the U.S. Code.”

(g) R.C.M. 704(c)(3) is amended to read as follows:

“(3) *Other limitations.* Subject to Service regulations, the authority to grant immunity under this rule may be delegated in writing at the discretion of the general court-martial convening authority to a subordinate special court-martial convening authority. Further delegation is not permitted. The authority to grant or delegate immunity may be limited by superior authority.”

(h) The first sentence of R.C.M. 704(e) is amended to read as follows:

“(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the general court-martial convening authority, or designee.”

(i) The header for R.C.M. 1103(b) is amended to read as follows:

“(b) *General and special courts-martial.*”

(j) R.C.M. 1103(b)(2)(A) is amended to read as follows:

“(A) *In general.* The record of trial in each general and special court-martial shall be separate, complete, and independent of any other document.”

(k) R.C.M. 1103(b)(3)(G) is amended to read as follows:

“(G) Any post-trial recommendation of the staff judge advocate or legal officer and proof of service on defense counsel in accordance with R.C.M. 1106(f)(1);”

(l) R.C.M. 1103(b)(3)(H) is amended to read as follows:

“(H) Any response by defense counsel to any post-trial review;”

(m) R.C.M. 1103(b)(3)(J) is amended to read as follows:

“(J) Any statement as to why it is impracticable for the convening authority to act;”

(n) R.C.M. 1103(c) is amended to read as follows:

“(c) [DELETED]”

(o) R.C.M. 1103A is amended to read as follows:

“(a) *In general.* If the report of preliminary hearing or record of trial contains exhibits, proceedings, or other materials ordered sealed by the preliminary hearing officer or military judge, counsel for the government or trial counsel shall cause such materials to be sealed so as to prevent unauthorized examination or disclosure. Counsel for the government or trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the preliminary hearing officer or military judge, and inserted at the appropriate place in the original record of trial. Copies of the report of preliminary hearing or record of trial shall contain appropriate annotations that materials were sealed by order of the preliminary hearing officer or military judge and have been inserted in the report of preliminary hearing or original record of trial. This Rule shall be implemented in a manner consistent with Executive Order 13526, concerning classified national security information.

(b) *Examination and disclosure of sealed materials.* Except as provided in the following subsections to this rule, sealed materials may not be examined or disclosed.

(1) *Prior to referral.* Prior to referral of charges, the following individuals may examine and disclose sealed materials only if necessary for proper fulfillment of their responsibilities under the Code, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility: the judge advocate advising the convening authority who directed the Article 32 preliminary hearing; the convening authority who directed the Article 32 preliminary hearing; the staff judge advocate to the general court-martial convening authority; and the general court-martial convening authority.

(2) *Referral through authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined or disclosed in the absence of an order from the military judge based upon good cause.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to R.C.M. 1111, sealed materials may not be examined or disclosed in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39(a) session directed by the convening authority.

(4) *After action.*

(A) *Examination by reviewing and appellate authorities.* Reviewing and appellate authorities may examine sealed materials when those authorities determine that examination is reasonably necessary to a proper fulfillment of their responsibilities under the Code, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) *Examination by appellate counsel.* Appellate counsel may examine sealed materials subject to the following procedures:

(i) *Sealed materials released to trial government or defense counsel.* Materials presented or reviewed at trial and subsequently sealed, as well as materials reviewed *in camera*, released to trial government or defense counsel, and subsequently sealed, may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of their responsibilities under the Code, this Manual, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(ii) *Sealed materials reviewed in camera but not released to trial government or defense counsel.* Materials reviewed *in camera* by a military judge, not released to trial government or defense counsel, and subsequently sealed may be examined by reviewing or

appellate authorities. After examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause.

(C) *Disclosure.* Appellate counsel shall not disclose sealed material in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under R.C.M. 1201(b) or 1112; or

(ii) Prior authorization of the appellate court before which a case is pending review under R.C.M. 1203 and 1204.

(D) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to R.C.M. 1112;

(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to R.C.M. 1201(b);

(iii) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(iv) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(v) The Justices of the United States Supreme Court and their professional staffs; and

(vi) Any other court of competent jurisdiction.

(5) *Examination of sealed materials.* For purposes of this rule, “examination” includes reading, inspecting, and viewing.

(6) *Disclosure of sealed materials.* For purposes of this rule, “disclosure” includes photocopying, photographing, disseminating, releasing, manipulating, or communicating the contents of sealed materials in any way.”

Section 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

(a) Mil. R. Evid. 311(c)(4) is amended to read as follows:

“(4) *Reliance on Statute or Binding Precedent.* Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acted in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment.”

(b) Mil. R. Evid. 311(d)(5)(A) is amended to read as follows:

“(A) *In general.* When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence.”

(c) Mil. R. Evid. 505(l) is amended to read as follows:

“(l) *Record of Trial.* If under this rule any information is reviewed *in camera* by the military judge and withheld from the accused, the accused objects to such withholding, and the trial continues to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) and 1103A and attached to the record of trial as an appellate exhibit. Such material will be made available to reviewing and appellate authorities in

accordance with R.C.M. 1103A. The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D).”

(d) Mil. R. Evid. 506(m) is amended to read as follows:

“(m) *Record of Trial*. If under this rule any information is reviewed *in camera* by the military judge and withheld from the accused, the accused objects to such withholding, and the trial continues to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as any motions and any materials submitted in support thereof must be sealed in accordance with R.C.M. 701(g)(2) and 1103A and attached to the record of trial as an appellate exhibit. Such material will be made available to reviewing and appellate authorities in accordance with R.C.M. 1103A.”

(e) Mil. R. Evid. 513(e)(6) is amended to read as follows:

“(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1103A.”

(f) Mil. R. Evid. 514(e)(6) is amended to read as follows:

“(6) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 701(g)(2) or 1103A.”

Section 3. Appendix 21, Analysis of Rules for Courts-Martial is amended as follows:

(a) R.C.M. 704(c) is amended by inserting the following at the end:

“*2017 Amendment:* A new second paragraph was added to the Discussion after R.C.M. 704(c). The Response Systems to Adult Sexual Assault Crimes Panel’s (RSP) June 2014 report recommended a study into grants of immunity for victim collateral misconduct in sexual assault cases. This new paragraph encourages convening authorities to respond to requests for immunity as soon as practicable if an expedited response is requested by the victim of an alleged offense.

The RSP was a congressionally mandated panel tasked to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses.”

(b) R.C.M. 704 is amended by inserting the following at the end:

“*2017 Amendment:* Modifications were made throughout R.C.M. 704. The Response Systems to Adult Sexual Assault Crimes Panel’s (RSP) June 2014 report recommended a study into grants of immunity for victim collateral misconduct in sexual assault cases. Subject to Service regulations, these modifications permit general court-martial convening authorities to delegate the authority to grant immunity to subordinate special court-martial convening authorities and no further. The RSP was a congressionally mandated panel tasked to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses.”

(c) R.C.M. 1103A is amended by inserting the following at the end:

“*2017 Amendment:* The Rule was reorganized and revised. It better addresses the two types of sealed materials commonly found in records of trial: those materials that had been disclosed to trial government and defense counsel prior to sealing and those materials that were not disclosed to trial government or defense counsel prior to sealing. The changes also maintain consistency with R.C.M. 701(g)(2), *United States v. Romano*, 46 M.J. 269 (C.A.A.F. 1997), and *United States v. Rivers*, 49 M.J. 434 (C.A.A.F. 1998), by requiring the appellate court or reviewing authority to conduct a review of sealed materials on appeal which had been reviewed *in camera*, not disclosed to trial government or defense counsel, and subsequently sealed prior to permitting appellate counsel the opportunity to examine such sealed matters. Finally, the rule better defines

the difference between “examination” and “disclosure” of sealed materials and the additional authorization needed prior to disclosure by appellate counsel.”

Section 4. Appendix 22, Analysis of the Military Rules of Evidence is amended as follows:

(a) Mil. R. Evid. 311 is amended by inserting the following at the end:

“*2017 Amendment:* The change to (c)(4) and(d)(5)(A) incorporates the Supreme Court’s holding in *Davis v. United States*, 564 U.S. 229 (2011). In *Davis*, the Supreme Court found that the exclusionary rule did not apply because the police officer acted in objectively reasonable reliance on precedent that was binding on the officer at the time of the search. *Id.*”

Section 5. The Discussion to Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) A new Discussion is inserted immediately after R.C.M. 104(b)(1)(B) and before R.C.M. 104(b)(2) and reads as follows:

“This rule applies when the counsel in question has been detailed, assigned, or authorized to represent the client as a defense or special victims’ counsel. Nothing in this rule prohibits supervisors from taking appropriate action for violations of ethical, procedural, or other rules, or for conduct outside the scope of representation.

“Special Victims’ Counsel,” as used in this rule, includes Victims’ Legal Counsel within the Navy and Marine Corps.”

(b) The Discussion immediately following R.C.M. 308(a) and before R.C.M. 308(b) is amended to read as follows:

“When notice is given, a certificate to that effect on the Charge Sheet should be completed. See Appendix 4. However, in cases where charges are immediately referred after preferral,

service of referred charges under R.C.M. 602 fulfills the notice requirement of this rule. In those cases, the notice certificate on the Charge Sheet need not be completed and should be lined out.”

(c) A new paragraph is added at the end of the Discussion immediately following R.C.M. 601(d)(2)(B) and before R.C.M. 601(e) and reads as follows:

“A specification under a charge may not be referred to a general court-martial unless the advice of the staff judge advocate concludes the specification alleges an offense under the Code, is warranted by the evidence, and a court-martial would have jurisdiction over the accused and the offense. *See* Article 34 and R.C.M. 406.”

(d) The first sentence of the Discussion immediately following R.C.M. 704(c) is amended to read as follows:

“Only general court-martial convening authorities or their designees are authorized to grant immunity.”

(e) The Discussion immediately following R.C.M. 704(c) is amended by inserting a new paragraph in between the first and second paragraphs, which reads as follows:

“When the victim of an alleged offense requests an expedited response to a request for immunity for misconduct that is collateral to the underlying offense, the convening authority should respond to the request as soon as practicable.”

(f) A new Discussion paragraph is inserted immediately prior to the existing paragraph following R.C.M. 704(c)(3) and reads as follows:

“A general court-martial convening authority has wide latitude under this section to exercise his or her discretion in delegating immunity authority. For example, a general court-martial convening authority may decide to delegate only the authority for a designee to grant immunity for certain offenses, such as a list of specific offenses or any offense not warranting a punitive

discharge, while withholding authority to grant immunity for all others. A general court-martial convening authority may also delegate only authority for certain categories of grantees, such as victims of alleged sex-related offenses.”

(g) A new Discussion is inserted immediately following R.C.M. 1103A(a) and prior to R.C.M. 1103A(b) and reads as follows:

“Upon request or otherwise for good cause, a military judge may seal matters at his or her discretion.

The terms “examination” and “disclosure” are defined in (b)(5) and (6) of this rule.”

(h) A Discussion is re-inserted immediately following R.C.M. 1103A(b)(3) and prior to R.C.M. 1103A(b)(4) and reads as follows:

“A convening authority who has granted clemency based upon review of sealed materials in the record of trial is not permitted to disclose the contents of the sealed materials when providing a written explanation of the reason for such action, as directed under R.C.M. 1107.”

(i) A new Discussion is inserted immediately following R.C.M. 1103A(b)(4)(B)(ii) and prior to R.C.M. 1103A(b)(4)(C) and reads as follows:

“For disclosure procedures, see (b)(4)(C) of this rule.”

(j) A new Discussion is inserted immediately following R.C.M. 1103A(b)(4)(C)(ii) and prior to R.C.M. 1103A(b)(4)(D) and reads as follows:

“In general, the Judge Advocate General or an appellate court should authorize disclosure of sealed material when such disclosure is necessary for review. Authorizations may place conditions on disclosure.”

Section 6. The Discussion to Part III of the Manual for Courts-Martial, United States, is amended as follows:

(a) A new Discussion is inserted immediately after Mil. R. Evid. 506(b) and before Mil. R. Evid. 506(c) and reads as follows:

“For additional procedures concerning information contained in safety investigations, consult Service regulations and DoD Instruction 6055.07, “Mishap Notification, Investigation, Reporting, and Record Keeping.””

Dated: November 22, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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